

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Masco Canada Limited

Serial No. 88619996

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Before Zervas, Lynch and Coggins, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Masco Canada Limited (“Applicant”) seeks registration on the Principal Register of the standard character mark ZAHRA for “plumbing products, namely, bathing units in the nature of bathtubs and shower enclosures” in International Class 11.¹

Registration has been finally refused pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that Applicant’s mark is likely to cause confusion or

¹ Application Serial No. 88619996 filed September 17, 2019, claiming a bona fide intention to use the mark in commerce pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

All references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal are to the Board’s TTABVUE docket system.

mistake or to deceive in view of the following three Principal Register typed² or stylized marks for the identified goods:

(1) Registration No. 2552043³ for the mark ZARA in typeset form for “lamps; lamp shades” in International Class 11;

(2) Registration No. 2987219⁴ for the mark ZARA HOME in typeset form for goods including “mirrors” in International Class 20 and “soap holders” in International Class 21; the term “HOME” has been disclaimed; and

(3) Registration No. 3835143⁵ for the stylized mark **ZARA HOME** for goods including “lanterns” and “lamps” in International Class 11. The term “HOME” has been disclaimed.

Each registration states that “[t]he English translation of the term ZARA in the mark is ‘maize’ or ‘Indian corn.’” A single entity owns each of these registrations.

After the Examining Attorney issued a final Office Action, Applicant appealed. Both the Examining Attorney and Applicant have filed briefs.⁶ We reverse the refusal to register.

Our determination under Trademark Act § 2(d) is based on an analysis of the

² Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed or typeset mark is the legal equivalent of a standard character mark. *See In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012).

³ Registered on March 26, 2002. Renewed.

⁴ Registered on August 23, 2005. Renewed.

⁵ Registered on August 17, 2010. Section 71 declaration accepted.

⁶ Applicant’s brief is single spaced. Briefs are to be double spaced. Trademark Rule 2.126(a)(1), 37 C.F.R. § 2.126(a)(1); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1203.01 (2021). However, because the brief is so short and would fall within the applicable page limits had it been double-spaced, we exercise our discretion to accept it. *See In re Univ. of Miami*, 123 USPQ2d 1075, 1077 n.2 (TTAB 2017).

Serial No. 88619996

probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999). We consider each *du Pont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation, and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity in any one of these four elements is sufficient to support a determination of likelihood of confusion. *See, e.g., Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356,

Serial No. 88619996

101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation and internal quotation marks omitted).

Turning first to the similarity or dissimilarity of the marks, Applicant states, “[t]he respective marks are clearly similar.”⁷ We agree. In spelling, ZARA and ZAHRA differ only through Applicant’s addition of a letter “H” in the middle of the mark. While we do not ignore this difference, we find that the marks look and sound nearly identical despite the addition of the letter “H,” and that it does not distinguish the similar commercial impressions of the marks. *See Elizabeth Arden Sales Corp. v. Faberge, Inc.*, 304 F.2d 891, 134 USPQ 186, 187 (CCPA 1962) (“[T]he words Extraordinaire and Extrordinaire are the same for all practical purposes”). We also point out that Applicant’s and Registrant’s marks are in standard-character and typed format, and could thus be depicted in the same font, style, size, or color. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000).

Registrant’s ZARA HOME marks include the term HOME. We find that this disclaimed term is at least merely descriptive of a feature of Registrant’s goods, indicating that they are intended for use in the home environment. As descriptive matter, HOME is less significant or less dominant when comparing marks. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (descriptive terms are properly given less weight). In addition, the stylization of this mark is

⁷ Applicant’s brief, 4 TTABVUE 2.

Serial No. 88619996

minor, and, as noted in the prior paragraph, Applicant's mark could be presented in the same font as depicted in this stylized mark.

We find Applicant's mark to be similar to the marks in the cited registrations based on appearance and sound.

Turning next to the similarity or dissimilarity of the goods, "[t]he issue to be determined . . . is not whether the goods . . . are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source." *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). It is not necessary that the parties' goods be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the goods are related in some manner or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, in light of the similarity of the marks, give rise to the mistaken belief that they come from or are associated with the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). We make our determinations based on the goods as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

When comparing goods under the second *du Pont* factor, similarity need not be

Serial No. 88619996

shown as to all of the goods in the application. “[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)); *see also In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

Applicant’s goods are “plumbing products, namely, bathing units in the nature of bathtubs and shower enclosures,” and the cited Registrant’s goods include lamps,⁸ lamp shades, mirrors and soap holders. The record does not include any evidence of third-party registrations that list goods in both the application and those in the cited registrations. *See In re Albert Trostel & Sons*, 29 USPQ2d 1785-86 (use-based, third-party registrations serve to suggest that the goods are of a type which may emanate from a single source). It does include, however, webpage printouts from Rejuvenation (Google cache of www.rejuvenation.com), Signature Hardware (signaturehardware.com), and eFaucets (efaucets.com), each offering bathtubs and

⁸ “Lamp” is defined in MERRIAM-WEBSTER DICTIONARY, accessed at <https://www.merriam-webster.com/dictionary/lamp> on July 29, 2021, as “any of various devices for producing light or sometimes heat: such as . . . a glass bulb or tube that emits light produced by electricity (such as an incandescent light bulb or fluorescent lamp).” We take judicial notice of this definition. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

Serial No. 88619996

lighting under the same mark to demonstrate that such goods are related.⁹ The Rejuvenation and eFaucets webpages also demonstrate a common source for mirrors and bathtubs, offered under the same marks. None of these webpages offer soap holders.

In addition, the record includes retail webpages from Ferguson (ferguson.com) and Butler Supply (butlersupply.com),¹⁰ offering under various marks a variety of goods, including bathtubs, shower liners, lamps and lamp shades. Mirrors and soap holders do not appear on these webpages; and the bathtubs and shower liners, and the lamps and lamp shades, are offered for sale under different marks on different webpages. Because “[t]he Internet is such a pervasive medium that virtually everything is advertised and sold through the Internet[,]” *Parfums de Couer Ltd. v. Lazarus*, 83 USPQ2d 1012, 1021 (TTAB 2007), the webpages from two merchants, Ferguson and Butler Supply, do not demonstrate a relationship between the goods.

Ultimately, only three webpages support the Examining Attorney’s position that Applicant’s goods and Registrant’s lamps and lamp shades are related and two webpages support her position that Applicant’s goods and Registrant’s mirrors are related. These limited submissions are not enough, by themselves, to establish that the goods identified in the application on the one hand, and in the cited registrations, on the other, would be perceived by consumers as emanating from a single source. *See Can. Dry Corp. v. Am. Home Prods. Corp.*, 468 F.2d 207, 175 USPQ 557 (CCPA

⁹ December 16, 2020 Office Action, TSDR 16-45.

¹⁰ July 8, 2020 Office Action, TSDR 2-41.

Serial No. 88619996

1972); *Autac Inc. v. Walco Sys. Inc.*, 195 USPQ 11, 15 (TTAB 1977); *Alliance Mfg. Co., Inc. v. Chi. Musical Instrument Co.*, 184 USPQ 118, 121 (TTAB 1975). The fact that all of these items can be found in bathrooms is not enough to establish that the goods are related.

In conclusion, although the marks are similar and the goods appear to travel through the same or similar channels of trade, the Examining Attorney has not established with this record that any of the goods are related such that confusion is likely to result from the contemporaneous use of the respective marks on the involved goods. Accordingly, on this record, we find that the Examining Attorney has not established a likelihood of confusion. We add, however, that while we have found no likelihood of confusion based on this ex parte record, in an inter partes proceeding with a different record, the result may be different.

Decision: The refusal to register under Trademark Act § 2(d) is reversed.